

No. 75-1844

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE LOVASCO, SR., RESPONDENT.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals is reported at 532 F.2d  
59.

JURISDICTION

The opinion of the Court of Appeals was filed on February 23, 1976. On April 21, 1976, the Court of Appeals denied the Petition for Rehearing and the Petition for Rehearing En Banc. On May 11, 1976, Mr. Justice Blackmun extended the time for filing a Petition for a Writ of Certiorari to and including June 20, 1976.

QUESTIONS PRESENTED FOR REVIEW

I

Were the defendant's Fifth Amendment rights violated by unreasonable pre-indictment delay coupled with prejudice to the defendant?

II

Would the defendant prove that the Government sought the delay to secure an improper tactical advantage by establishing the unreasonable pre-indictment delay and that the Government did not explain or justify its reason for the delay?

III

Must a Motion to Dismiss for a Fifth Amendment violation based on pre-indictment delay await the conclusion of the trial?

STATEMENT OF THE CASE

On March 6, 1975, an indictment was returned by the Grand Jury in four counts in which the first three counts alleged possession of stolen mail matter containing pistols in violation of 18 U.S.C. §1708, and the fourth count alleged sale of firearms without a license in violation of 18 U.S.C. §§922(a)(1) and 924(a).

On March 18, 1975, defendant filed a Motion to Dismiss the indictment in which he alleged pre-indictment prejudice in the delay between the time that he was interviewed by the Government, which was September 26, 1973, and the presentation to the Grand Jury on March 6, 1975, a period of about 17 months. The Motion was heard and submitted on April 25, 1975. On October 8, 1975, an Order was entered by the District Court sustaining the Motion to Dismiss as to all counts.

The testimony before the District Court established that a statement was taken from the defendant on September 26, 1973, and that the Postal Inspector's Office submitted a report to the United States Attorney on October 2, 1973, naming the defendant as the "offender". Page 4 of this report named the witnesses against the defendant, their testimony, and the exhibits to be introduced into evidence against defendant.

The defendant testified that two witnesses for him were now deceased. One was Thomas Lovasco, brother of the defendant, who had

been employed by Florissant Dodge where Joe Boaz, a Government witness (D.Exh.A)(Tr. 16), also worked (Tr. 6). That Thomas Lovasco, who introduced Boaz to defendant, was present during all of the transactions, and died in April, 1974. The other deceased witness was Tom Stewart. Defendant testified that he had obtained some guns from him, and that Stewart had died about six months before the hearing on the Motion (Tr. 8).

Mr. G.P. Wellner, the Postal Inspector, testified that defendant called him at his office some 5 or 6 times (Tr. 15) after defendant had given him the statement in his office in September, 1973 (Tr. 18) and expressed concern about a possible indictment on these occasions (Tr. 6). Mr. Wellner further testified that defendant's Exhibit A was the entire written report submitted to the United States Attorney (Tr. 20). The Government stipulated that the matter was scheduled for the Grand Jury without any additional evidence (Tr. 20).

On August 8, 1975, the Government presented a superseding information charging a misdemeanor (Tr. 24), to which the defendant pled guilty. After inquiry by the Court, the Court refused to accept the plea which was concurred in by the Government (Tr. 32).

On October 8, 1975, the District Court entered an Order sustaining the Motion to Dismiss the four counts of the indictment and found:

"The evidence disclosed and we find that as of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to defendant's alleged commission of the offenses charged against him, but did not charge defendant or present the matter to a grand jury until more than 17 months thereafter. The indictment was returned March 6, 1975."

and further held that defendant had been prejudiced by the delay by reason of the death of Tom Stewart, a material witness on his behalf, and that the Government's delay had not been explained or justified and that it was unnecessary and unreasonable.

On February 23, 1976, a divided panel of the Appeals Court, consisting of Justice Clark and Judge Bright, sustained the dismissal of the three counts of possession of stolen mail matter, and ordered reinstatement of the count of sale of firearms without a license. The majority held that defendant had established that the pre-indictment delay was unjustified, unnecessary and unreasonable and that the defendant was prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. A dissent was filed by Judge Henley.



REASONS FOR DENYING THE WRIT

I

The defendant's Fifth Amendment rights were violated by unreasonable pre-indictment delay coupled with prejudice to the defendant.

The Court of Appeals has found here that defendant satisfied the two basic elements to a claim of pre-indictment delay to constitute a violation of due process of law under the Fifth Amendment, unreasonable pre-accusation delay coupled with prejudice to the defendant. This criteria was discussed in United States v. Jackson, 504 F.2d 337, 339 (8th Cir. 1974), cert. denied 420 U.S. 964 (1975) and was based on United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) in which this Court recognized that there may be a Fifth Amendment violation of due process for pre-prosecution delay.

a. The Government has not appealed to this Court the finding made by the Appeals Court that actual and substantial prejudice was established, (Brief, p. 18, n. 12); however, it does go on to argue these facts and questioned the impairment to the defense by the delay.

The prejudice here is obvious in that two witnesses died prior to the date of the indictment. Barker v. Wingo, 407 U.S. 514, 532, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). These two witnesses were the defendant's brother, Tom Lovasco, who was present during all of the transactions with a co-worker, Joe Boaz, the Government witness to whom the guns were allegedly sold, and Tom Stewart, an individual from whom defendant had obtained some guns. Tom Lovasco died in April, 1974, and Tom Stewart died about six months before the hearing on the Motion, or 5 months prior to indictment.

The Appeals Court found "that were Stewart's testimony available it would support his claim that he did not know that the guns were stolen from the United States mails." Tom Lovasco could have testified about the transactions with Joe Boaz, and that the defendant made no statements indicating knowledge that the guns were stolen.

Thus, it is obvious that defendant has been impaired in his defense by the death of two witnesses during the prolonged delay of the presentation of the matter to the Grand Jury. A trial of the cause without the witnesses negates defendant's rights to a fair trial.

b. The Government has not appealed to this Court the finding by the Appeals Court on the unreasonable pre-indictment delay:

The district court deemed the delay unjustified, unnecessary and unreasonable. That determination is supported by the evidence.

The District Court in its Order stated:

The evidence disclosed and we find that as of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to defendant's alleged commission of the offense charged against him, but did not charge defendant or present the matter to a grand jury until more than 17 months thereafter.

Further, the Appeals Court stated in its opinion:

The postal inspector in charge of the case testified that he would have recommended the prosecution of the case and presentation of the evidence to the grand jury based on the information contained in the report submitted to the United States Attorney on October 2, 1973.

The Government has argued that the delay was caused by the Government's efforts to identify persons, in addition to Respondent, who may have participated in the offenses charged in the indictment (Brief, p. 14). No evidence was presented on these

efforts before the District Court. The Appeals Court even gave the Government the benefit of any doubt by incorporating the statement of the prosecutor at oral argument, which was not before the District Court:

At oral argument the prosecutor indicated the delay in the prosecution resulted from awaiting results of further investigation which might have implicated the person or persons who may have stolen the mailed matter.

However, the Appeals Court answered this by saying:

No reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft of firearms from the United States mails.

Thus, the Government in fact did not give any reason or excuse for its failure to present the matter earlier.

The Government rationalizes its delay by stating that prosecutors have limited resources, that there is a problem of assigning priorities, and that these are institutional problems and not malevolent considerations.

This constitutionally impermissible reasoning is answered by United States v. Barket, 530 F.2d 181, 195 (8th Cir. 1976):

The fact that the governmental lack of communication between its component parts "was inadvertent" does not lessen its impact. Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971). This conduct adds an additional factor favoring Barket in the Fifth Amendment balance. See Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

As a result of the failure of the Government to support any reasons for delay and to refute the prejudice to defendant, the Government has argued that this Court's dictum in United States v. Marion, supra, suggests that due process would require the dismissal of an indictment only if it were shown that pre-indictment delay caused substantial prejudice to the accused's right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

The Eighth Circuit in United States v. Jackson, supra, p. 339, n. 2, believed that the rule in Marion required the defendant to affirmatively demonstrate prejudice where the Government is not engaging in intentional delay in order to gain a tactical advantage over the accused.

It is believed that the facts here support a dismissal of the three counts of the indictment as that "delicate judgment based on the circumstances of each case" United States v. Marion, supra, at p. 325.

## II

The defendant proved that the Government sought the delay to secure an improper tactical advantage by establishing the unreasonable pre-indictment delay and that the Government did not explain or justify its reason for the delay.

The Government's position that the defendant must prove that the Government sought the delay to secure an improper tactical advantage is satisfied by the defendant presenting evidence of the unreasonable lengthy delay and the failure of the Government to explain or justify its reason for this delay.



The Government would like this Court to rule that the defendant must prove affirmatively, in addition to prejudice, that the delay was an intentional device to gain tactical advantage over the accused. The reason for this approach is transparent. No one could ever satisfy this criteria, this proof is totally subjective, and a due process claim on pre-indictment delay would be hopeless.

It would be difficult or impossible for the defendant to obtain evidence and the names of the Government people who were sitting back waiting for all of defendant's witnesses to die, or until witnesses disappear, or until all memories of the incidents fade.

Thus, if this Court believes that such an element of proof of "gaining tactical advantage" must be proven, then the District Court and the Appeals Court have in effect ruled for defendant on that point.

Prima facie proof should be established in the sameway as in a race case, McDonnell Douglas v. Green, 411 U.S. 792, 802 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), by showing that there has been:

1. an inordinate amount of lapse of time between the completion of the investigation and the presentation to the Grand Jury;
2. that at the completion of the investigation there was no further investigation necessary to present evidence to the Grand Jury;
3. that the nature of the crime was not one that requires

continuous investigation.<sup>1</sup>

The burden should then shift to the Government to give a reason or justification for its delay.

The defendant can then show the pretextuality if any for the reason given.

Here, the defendant satisfied all criteria above and the Government gave no reasons; therefore, defendant was not called upon to rebut the reasons.

Thus, the District Court and the Appeals Court's findings:

"that the delay was unjustified, unnecessary and unreasonable"

should establish the proof that the delay was sought to secure an improper tactical advantage.

### III

A Motion to Dismiss for a Fifth Amendment violation based on pre-indictment delay should not await the conclusion of the trial.

The Government has stated that the due process claim here should be resolved after trial.

The matter of delay in the presentation to the Grand Jury is not a relevant detail in most trials. The facts of the delay are capable of determination without the trial of the general issue. Rule 12(b), Federal Rules of Criminal Procedure, and there is no good

<sup>1</sup> This case does not involve the matter of narcotics and the special reasons for delay of an indictment. See United States v. Jackson, *supra*, at p. 340; United States v. Washington, 504 F.2d 346 (8th Cir. 1974); United States v. Norton, 504 F.2d 342 (8th Cir. 1974); United States v. White, 488 F.2d 560 (8th Cir. 1973); United States v. Emory, 468 F.2d 1017 (8th Cir. 1972). Nor is this a complicated case of conspiracy or fraud. See United States v. Marion, *supra*; United States v. Librach, 520 F.2d 550 (8th Cir. 1975).

reason for the Motion to be deferred for determination after verdict<sup>2</sup>  
under Rule 12(e), Federal Rules of Criminal Procedure.

A dismissal of the indictment, if the facts warrant, prior to trial will certainly be an economy of judicial time. There is no reason to believe as suggested by the Government, that the pre-trial hearing would be lengthy, and there doesn't appear to be any reason why there would be duplication of evidence.

Constitutional challenges on the Fourth Amendment prior to trial on illegal searches and seizures are held routinely in Federal Courts in which facts which are also testified to at trial are presented without apparently burdening the Court's calendar.

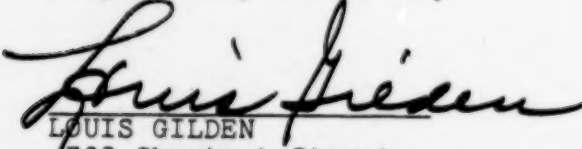
The Government here is attempting to avoid its responsibility to answer at an early time the claim of prejudicial delay. Fairness would dictate that a defendant should not have to wait for the resolution of a constitutional challenge to the indictment. If the facts warrant a dismissal, the time and money for a trial are avoided.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

<sup>2</sup>  
See United States v. Covington, 395 U.S. 57, 60, 89 S.Ct. 1559, 23 L.Ed.2d 94 (1969).

Respectfully submitted,

  
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